SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1165

ZALI FRIED, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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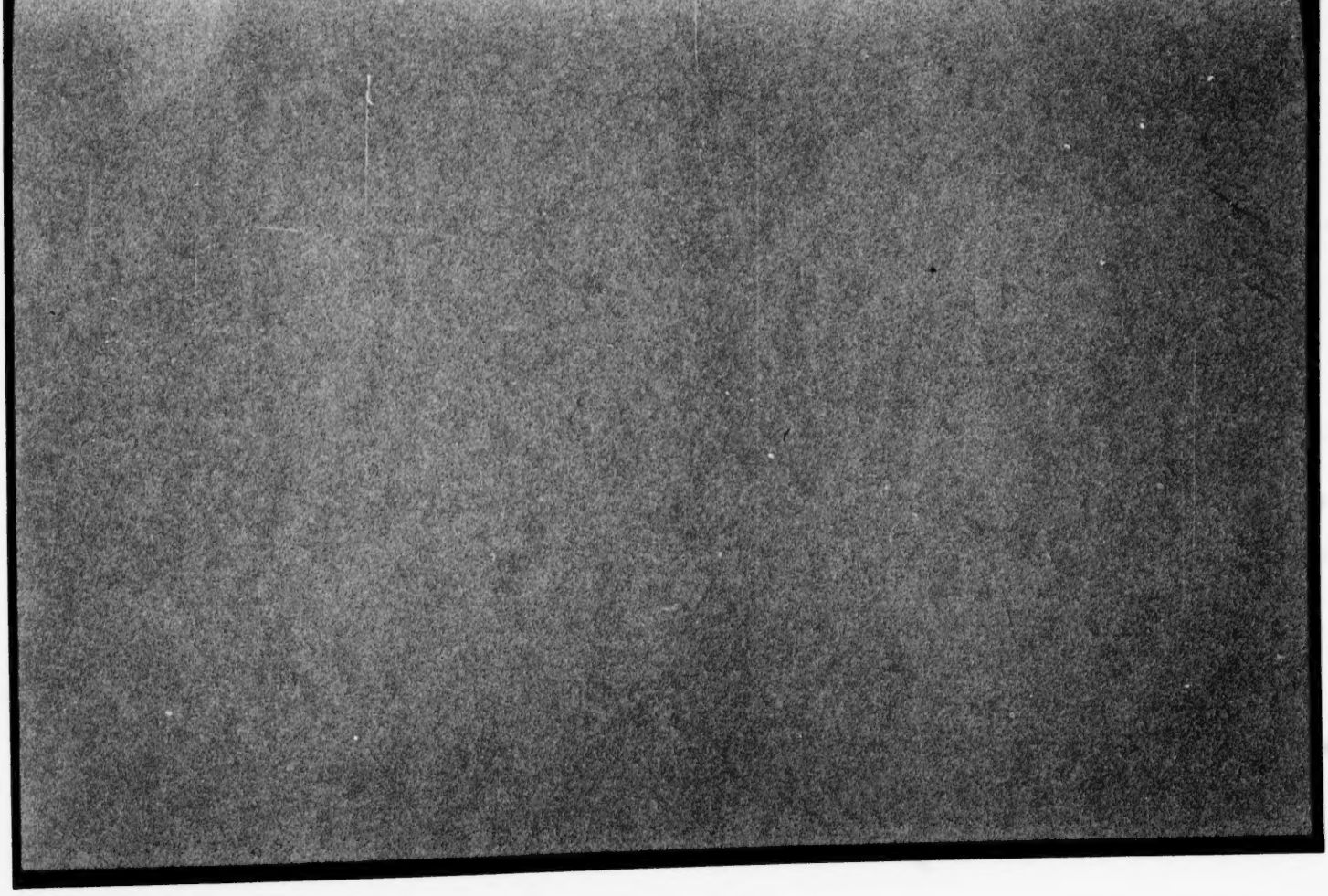

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OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, Appendix A, p. 1a, *infra*, is not yet reported. The opinion of the District Court (Bartel, J.), p. 5a, *infra*, is not reported.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed on October 12, 1973. A timely filed petition for rehearing and suggestion for rehearing in banc

were denied on November 30, 1973. On December 21, 1973, Mr. Justice Marshall granted an order extending the time to file a petition for writ of certiorari to and including January 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the court of appeals, which held that a prosecutor's negligent suppression of evidence favorable to the defense had invalidated petitioner's conviction on one count of an indictment, erred when, *sua sponte*, it sustained her conviction on a closely related count merely because there was some other evidence, in addition to the testimony of the now-discredited key government witness, which related to the petitioner's guilt.

STATUTES INVOLVED

18 U.S.C. § 659 provides in relevant part as follows:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any . . . wharf . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen: . . . .
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 2315 provides in relevant part as follows:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; . . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

1. The Original Trial

Mrs. Fried and her husband, Ishak Fried, own and operate the Fried Trading Company, an importing concern in Brooklyn, New York, that does approximately two million dollars of business annually. Both Mr. and Mrs. Fried were named in a four-count indictment charging them, her son by a former marriage, Simon Brach, and one Aaron Schatten with various offenses arising out of the possession and sale of 589 cartons of Japanese stereos allegedly stolen from a Brooklyn pier. After a trial by jury, Mrs. Fried and Brach were found guilty on Counts 2 (possession) and 3 (sale) of the indictment; the jury was unable to agree on a verdict with respect to the remaining defendants and the other counts. Petitioner was sentenced to three years' imprisonment and a $5,000 fine on Count 2 and a subsequent two-year period of probation on Count 3. The convictions were affirmed on appeal. *United States* v. *Fried*, 464 F.2d 983 (2nd Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972).

The possession charge was for possession of the same stolen property which Mrs. Fried was convicted of selling. There was no testimony whatever that Mrs. Fried had actual physical possession, at any time, of the allegedly stolen stereo units. The case against her was entirely circumstantial in that it was based on delivery to purchasers (Joseph Levy, William Hendler, and retailers of Carl Beddo) of allegedly stolen stereo units by persons connected with the Fried Trading Company and participation in selling efforts by Mr. and Mrs. Fried. The initial and principal witness among the three was Joseph Levy, from whom most of the allegedly stolen stereos were recovered.

The jury's guilty verdict on the sale count could have related only to the sale to Levy, since only that sale met the dollar-value minimum of 18 U.S.C. § 2315. Judge Bartels also instructed the jury that it should find "constructive possession" of stolen merchandise from a defendant's "relationship" if "his or her relationship with the merchandise is such that he or she had dominion or control over the merchandise." Orig. App. 1427.[1] *Under this instruction, the jury virtually had to convict any defendant, including petitioner, on the possession count if it found that defendant guilty on the sale count.*

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[1] The designations "Orig. Trans." and "Orig. App.": will be used for the original trial transcript and the Appendix on the original appeal. The designation "App." will be used for the Appendix prepared for the instant appeal. The hearing transcript is separately paginated in the printed appendix prepared for the instant appeal. References to that hearing are designated "App. Tr.".

2. The Motion for a New Trial

After affirmance of her conviction, present counsel were retained to represent Mrs. Fried separately, and their investigation turned up, *inter alia*, the fact that on February 26, 1970—more than eight months before the incidents alleged in this indictment—Joseph Levy had been indicted in the United States District Court for the Southern District of New York on the same statutory offense charged in the present indictment—possession of goods stolen from a pier after a shipment in foreign commerce, in violation of 18 U.S.C. § 659.

On the basis of this and other indicia of prosecutorial suppression of exculpatory evidence,[2] petitioner's counsel, on October 24, 1972, filed a motion for a new trial. On March 30, 1973, a hearing was held before District Judge John R. Bartels, at which the Assistant United States Attorney testified concerning, *inter alia*, his non-disclosure of the pending indictment. He admitted knowledge, prior to petitioner's trial, of the indictment charging Levy with a violation of 18 U.S.C. § 659, of the fact that "stolen property" was involved, and that the case was pending in the Southern District of New York (App. Tr. 25, 27).[3] He also

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[2] See Note 10, *infra*.

[3] He testified that he first met Joseph Levy in May or June of 1971 shortly before Levy testified to the grand jury, that he believed he learned of Levy's federal indictment from Levy's attorney, who accompanied Levy to his first meeting in the prosecutor's office (App. Tr. 18-23), and that he did not ask the FBI for Levy's arrest record (App. Tr. 20) and that he never saw the indictment (App. Tr. 26). He added that he was not concerned with Levy's indictment and that "it didn't make an impression on me at the time" (App. Tr. 29). Although the matter of Levy's indictment had "completely slipped [his] mind", "if it had occurred to me at the time . . . I would have made the defense aware of it, even if they didn't ask for it . . . ." (*ibid*).

testified that several months after Mrs. Fried's trial, he again discussed Levy's indictment with Levy. At that time Levy had been convicted in the Southern District of New York and the prosecutor was requested to write a letter to the sentencing judge. The letter to the judge—dated the day before the sentencing—stated that Levy had "fully cooperated" with the FBI and the prosecutor, that he had testified both before the grand jury and at trial, and that "without his testimony the prosecution of the defendants Zali Fried, Simon Brach and Aaron Schatten would not have been successful" (App. 103a).[4] Joseph Levy received a suspended sentence and a $1,000 fine (App. Tr. 75; App. 102a).

3. The Opinions Below

Judge Bartels concluded that the prosecutor

> was careless in not making the disclosure and that his failure to disclose was improper conduct in spite of the probability that the indictment would not have been admissible. But we also find that the evidence was not deliberately suppressed for the sake of obstruction, nor that its value to the defense was so high that it could not have escaped the prosecutor's attention.

App. B, p. 11a, *infra*. Concerning this finding, the Court of Appeals stated, App. A, p. 3a, *infra*:

> At the conclusion of the post-trial hearing Judge Bartels found that the prosecutor's nondisclosure of the indictment, though careless, was not deliberate. With some reluctance we accept this finding which has evidentiary support in the testimony of the prosecutor himself, Assistant United States Attorney Thomas Puccio. Surely

[4] The letter is reprinted as Appendix C hereto, pp. 15a, *infra*.

> the average competent prosecutor would quickly recognize the importance and value of this information to the defense, even in the absence of a request for it. Such negligence hardly adds lustre to an important government office whose aim should be to achieve justice rather than merely to obtain convictions.

Judge Bartels also stated that the new indictment "arguably . . . might be admissible to show possible motivation of the witness to testify favorably for the Government and also lead the defense to investigate possible government promises to the witness." App. B, p. 11a, *infra*. Nonetheless, he denied the new trial motion as to the convictions on both the selling count and the possession count on the apparent reasoning that since the prosecutor "categorically denied that any promises were made to Levy with respect to the Southern District indictment or otherwise for his testimony" (App. B, p. 11a, *infra*), the disclosure of the indictment "would have had no effect upon the jury's verdict" (*Id.*, p. 12a, *infra*).

Concerning these conclusions the Court of Appeals ruled (App. A, p. 2a *infra*):

> The principal item of information which the government failed to disclose to the defense was the pendency in the Southern District of New York of an indictment against Joseph Levy, a key government witness, charging him with receiving other stolen goods (a shipment of clothing stolen from a pier).
>
> The indictment was particularly significant for the reason that if it had been disclosed by the government the defense would have used it to impeach Levy's credibility and would have urged that he

> was testifying favorably for the government against Mrs. Fried in the expectation that he would be accorded leniency in the pending case against him. See *United States* v. *Bonanno*, 430 F.2d 1060 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970); *United States* v. *Campbell*, 426 F.2d 547, 549 (2d Cir. 1970). Indeed, as matters turned out Levy was later convicted after a trial in the Southern District of New York and the prosecutor in the present case wrote a letter to the sentencing judge pointing out the importance of Levy's testimony against Mrs. Fried. Thereafter Levy received a suspended sentence and $1,000 fine. In addition, since the indictment against Levy charged him with the same type of offense as that leveled against Mrs. Fried (receiving goods stolen off a pier), a jury might have reasoned that Levy may have been implicating Mrs. Fried in order to exculpate himself in the present case.

On this basis the Court of Appeals reversed the conviction on the selling count of the indictment (for which Mrs. Fried received a sentence of two years' probation):

> Accepting the view that this was a case of negligent non-disclosure, we are governed by the rule that a new trial may be ordered only upon a showing that there is a significant chance that the non-disclosed item, developed by skillful counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. See *United States* v. *Miller*, 411 F.2d 825 (2nd Cir. 1969); *cf. United States* v. *Bonanno*, 430 F.2d 1060 (2nd Cir.), *cert. denied*, 400 U.S. 964 (1970). We find that this test has been met as to Count 3, which was based entirely on the sale of stolen goods. Since the government's case against Mrs. Fried in support of Count 3 rested almost en-

> tirely on Levy's testimony, it is clear that if the indictment against him for possession of other stolen goods had been revealed by the Government his credibility would probably have suffered a severe blow. There is therefore a significant chance that such a material disclosure would have raised a sufficient doubt in the minds of enough jurors to negate conviction.

App. A, p. 3a, *infra*. ***But on an entirely novel theory never argued by the Government or suggested by Judge Bartels*** (the trial judge) ***and never argued at any prior stage in the proceedings***, the Court proceeded to affirm the conviction on the less serious charge of possession of the *same* allegedly stolen goods (for which Mrs. Fried received a sentence of three years' imprisonment):

> We cannot conclude that such evidence might have induced a similar doubt with respect to Mrs. Fried's guilt on Count 2, which charged unlawful possession of stolen goods, including stereos other than those sold to Levy. That count was established by proof wholly independent of Levy's testimony. For instance, William Hendler, a Philadelphia appliance dealer, testified that on October 27, 1970, Mrs. Fried induced him to purchase 15 cartons of stereos later proved to have been stolen, which were shipped to him from a non-existent concern, G.S. Trading Company, 55 Avenue A, New York City. Later she called him once or twice and offered to sell him other merchandise. ***This testimony by Hendler, which remains untainted by the impeaching effect of the disclosure of Levy's indictment, provides an ample independent basis for the verdict finding Mrs. Fried on the possession count.***

App. A, p. 4a, *infra* (emphasis added).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in conflict with controlling decisions of this Court (*e.g.*, *Yates* v. *United States*, 354 U.S. 298 (1957)) and presents an important federal question concerning due process rights of defendants in federal criminal prosecutions and the responsibility of the federal judiciary for the integrity of the administration of justice in federal criminal prosecutions.

1. The Court of Appeals, in drawing its own distinction between the counts in the indictment on which Mrs. Fried was convicted, simply applied the wrong legal standard.[5] For here, as in *Yates* v. *United States*, 354 U.S. 298, 312 (1957):

> the proper rule to be applied is that which requires a verdict to be set aside in cases where the

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[5] While stating the standard of materiality set forth in *United States* v. *Miller*, 411 F.2d 825 (2nd Cir. 1969) ("a significant chance that such a material disclosure would have raised a sufficient doubt in the minds of enough jurors to negate conviction", App. A, p. 3a, *infra*) the holding with respect to the possession count appears to rely on an entirely different standard which is closer to that applied by a court in reviewing an administrative agency's action. ("This testimony by Hendler, which remains untainted by the impeaching effect of the disclosure of Levy's indictment, provides an ample independent basis for the verdict finding Mrs. Fried [guilty] on the possession count." App. A, p. 4a, *infra*.)

In any event, under the *Yates* case the issue is *not* whether Hendler's testimony is "tainted" *or* whether there would be ample support to sustain a conviction if Levy had never testified, but rather whether, given the fact that he did testify, the jury's general verdict must, in light of the record and the Court's instruction, be *presumed tainted* because it could (and surely did, at least in part) have rested on Levy's testimony. Petitioners respectfully suggest that the Court of Appeals fell into error in its selection of legal standards because, acting entirely *sua sponte*, it devised its own distinction between the two counts of the indictment. Therefore it might be appropriate for this Court to reverse this case and remand for reconsideration in light of *Yates* and related cases.

> verdict is supportable on one ground but not on another, and it is impossible to tell which ground the jury selected.

See also *Stromberg* v. *California*, 283 U.S. 359 (1931); *Street* v. *New York*, 394 U.S. 576, 588 (1969); *Leary* v. *United States*, 395 U.S. 6, 30-32 (1969); *Bachellar* v. *Maryland*, 397 U.S. 564, 570-71 (1970); *Greenbelt Coop. Publishing Ass'n.* v. *Bresler*, 398 U.S. 6, 23-24 (1970) (Mr. Justice White, concurring); *Beck* v. *United States*, 298 F.2d 622, 630-31 (9th Cir. 1962); *United States* v. *Williams*, 464 F.2d 927, 931 (8th Cir. 1972); *cf.*, *United States ex. rel. Levy* v. *Cain*, 149 F.2d 338, 342 (2nd Cir., 1945) (L. Hand, J.).

Thus, the possession count in the indictment covered both the alleged Levy sale and the alleged Hendler and Beddo sales.[6] And here, just as in *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931) and *Williams* v. *State of North Carolina*, 317 U.S. 287, 291 (1942), the verdict of the jury on the possession count was a general one (Orig. App. 1458-59). The case was presented to the jury below as one turning on the circumstantial force of receipt of stolen goods by three independent dealers (Levy, Hendler, and Beddo's retailers) all of whom dealt with one or another of the Fried family. *E.g.*, Orig. Tr. 1372 (prosecutor's sum-

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[6] The date of the alleged Hendler transaction was October 28, 1970 (Orig. App. 206-07). The date of the alleged Levy transaction was November 2-3, 1970 (Orig. App. 15-24). The date of the alleged Beddo transaction was November 2, 1970 (*Id.*, 469-71).

Count Two of the indictment charged:

> On or about and between the 22nd day of October 1970 and the 3rd day of November 1970, both dates being approximate and inclusive, . . . the defendant Ishak Fried, the defendant, Aaron Schatten did wilfully and unlawfully receive and have in their possession a quantity of Unisonic AM-FM stereos . . . .

mation). Neither judge, nor prosecutor, nor defense counsel made *any* distinction between Levy's testimony and that of Hendler or Beddo for purposes of Mrs. Fried's guilt or innocence on the possession count. This case falls squarely within the direct holding of this Court in *Yates* that the verdict must be set aside where "supportable on one ground, but not another, and it is impossible to tell which ground the jury selected."

Indeed, this case follows *a fortiori* from *Yates*, *Stromberg*, *Williams* and related cases. For here, the jury convicted on the sale count. Since only the Levy sale exceeded the jurisdictional minimum for a selling conviction under 18 U.S.C. § 2315, the jury must have credited Mr. Levy's testimony. And since the judge instructed the jury that Mrs. Fried could be convicted of possession if "constructive possession" (defined as exercising "dominion or control over the merchandise", Orig. App. 1427) were found, the jury *had* to be convicting Mrs. Fried of "possessing" the Levy goods in its general verdict of guilty as to Count Two.[7] Here, then, unlike *Yates* and related cases, the problem is not merely one of the "impossibility" of guessing whether the jury relied on the improper factual basis. There is virtual certainty that the jury did so rely, at least in part.

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[7] In fact, the verdict demonstrated that the jury took this course. Of the four defendants and four counts, it convicted only two defendants on two charges—Simon Brach and Mrs. Fried on the possession and sale counts. *Since there was absolutely no direct evidence whatever tying Brach to the sale of stereos to Hendler, the jury plainly could not have been returning its verdict on Count 2 because of the testimony given by Hendler; it must have been relying on Levy's testimony that Brach and the Fried Trading Co. had dealt in the stolen merchandise with Levy.*

2. In another respect, reversal of petitioner's conviction on the possession count might be said to follow *a fortiori* from this Court's decision in *Yates* and related cases. For here the improper ground on which the jury's general possession verdict may rest is a product of serious prosecutorial misconduct (negligence at least) in not disclosing potentially exculpatory evidence which the Court of Appeals expressly found seriously damaging to the credibility of a key Government witness. App. A, p. 3a, *infra*. Disclosure of Levy's pending indictment was thus mandated by the Fifth Amendment's Due Process Clause. See *Giglio* v. *United States*, 405 U.S. 150, 153-54 (1972). And here the culpable prosecutor is a federal prosecutor, over whom this Court has far broader supervisory responsibility to preserve the integrity of the administration of criminal justice in federal courts than is the case with state prosecutors. See *Mesarosh* v. *United States*, 352 U.S. 1 (1956); *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124 (1956); see also *Ker* v. *California*, 374 U.S. 23, 31 (1962); *Saldana* v. *United States*, 365 U.S. 646, 647 (1961).[8]

Finally, here as in *Napue* v. *Illinois*, 360 U.S. 264 (1959) the record reflects that the prosecutor during the trial sat back and allowed testimony in the record by Mr. Levy which contradicted the known (but carelessly forgotten) fact of his pending indictment.

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[8] The prosecution stands to retain the major fruits of its misconduct (petitioner's three-year incarceration) while surrendering only a subsequent two-year probation. Obviously any incentive to abide by the dictates of cases such as *Giglio* is rendered *de minimis* if the prosecutor can simply cover himself with "untainted" testimony on a separate count.

Thus, here as in the *Napue* case, 360 U.S. 270-71, defense counsel attempted—by questions both relating to his arrest for being in possession of the stereos and by questions regarding possible favors offered by the Government—to establish that Levy had a motive for cooperating with the Government. See Orig. App. 41, 58-59. Mr. Levy was permitted to deny under oath, without correction by the prosecutor, ever having been in court for any charge other than relating to the stereos (Orig. App. 58-59) [9] and that the only charges then known to defense counsel (*i.e.*, those relating to the stereos) had been dropped prior to his testimony. Orig. App. 81. And the prosecutor here undertook to emphasize Mr. Levy's credibility to the jury in his parting shot in summation.[10] *Cf.*, *Napue*, *supra*, at 270. Knowingly permitting false testimony to be

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[9] Since Mr. Levy was in fact arraigned in federal court on the pending but undisclosed indictment prior to his testimony, his assertion that he had never been in federal court except for his arrest in relation to the stereos was a flat falsehood.

In his direct testimony concerning a telephone conversation with Mr. Fried, Mr. Levy undertook at another point to generate the impression in the jury's mind that with the exception of the stereos involved in this case he never had any other troubles with the law (Orig. App. 41):

> "I said 'With how many companies am I dealing with? I don't want to hear any monkey business. *I'm in trouble that I was never in before, and I want the bill brought up to me.*' " (Emphasis added).

[10] See Orig. App., 715:

> "But I say to you, why would the fellow with the little store on Orchard Street want to lie about Mr. Fried?"

The prosecutor also contended in summation that Levy could not have been intentionally lying to "sink" the Frieds, because if that were his motive (Orig. App. 704):

> ". . . if he wanted to tell a lie, he would say, 'Mr. Fried came in and he said I have this stolen merchandise, and I want you

presented is in and of itself a violation of the defendant's due process rights compelling reversal in a state prosecution. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Miller* v. *Pate*, 386 U.S. 1 (1967); *Giles* v. *Maryland*, 386 U.S. 66 (1967). At least in a federal prosecution where this Court in a federal system has a special duty to see to it that the actions of the prosecution are not "inconsistent with the correct administration of justice in the federal courts." *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 571 (2nd Cir. 1961) (Swan, J.) the salutary principle of *Napue* and related cases should not be permitted to disappear because of a prosecutorial "slip of the mind"—one which

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to buy some of it and it's very cheap and I am giving you a good break.'

That is the kind of conversation he would use if he wanted to lie about Mr. Fried.

If he really wanted to sink Mr. Fried, he would not just testify Mr. Fried said, 'Here is 100 stereos'.

He would testify Mr. Fried said, 'I want to sell you some slag, to sell you stolen merchandise. It is not going to cost you much.'

'Keep your mouth shut.'

That is the kind of testimony you would get from Mr. Levy if it were not true."

Had the defense and the jury known what had slipped the prosecutor's mind—that Levy was and had been under indictment for possessing stolen merchandise—this argument would have been rebutted and rejected. Indeed, the prosecutor doubtless would not have even made the argument since the explanation for Levy's testimony would have been so apparent: even if he wanted to "sink" the Frieds, Levy would not conceivably have been able to testify that he had agreed to buy more stolen merchandise just nine months after he was indicted in a federal court for possessing goods stolen from foreign commerce.

the Court of Appeals itself suggests could *not* have happened to "the average competent prosecutor". App. A, p. 3a, *infra*.[11]

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[11] There was also testimony at Mrs. Fried's trial regarding an outer carton found outside the storage room used by Joseph Levy in a loft across the street from his store. The prosecutor argued to the jury that the carton was part of the order that Brach (the son) had delivered to Levy, and that since the numbers on the carton matched those which were allegedly stolen it proved that the Fried Trading Co. had sold stolen stereos to Levy (Orig. App. 495-496, 696). In fact, Joseph Levy's brother, Aaron Levy, had told the prosecuting attorney on the first day of trial that he personally had thrown out all the cartons in which the stereos delivered to the Levys by Brach had been packed. He also stated in an affidavit filed in support of the motion for a new trial that he had told the prosecutor that a neighboring merchant, Sonny Goldsmith, had told him that the remaining carton in the loft was his (App. 55a). In responding to the contention that this constituted suppression of exculpatory proof, the prosecutor said that "it is conceivable that an argument can be made that the oral disclosure made to me by Aaron Levy as to his having disposed of all the outer cartons of the shipment received should have been made known to the defense under a broad interpretation of *Brady* v. *Maryland*, and related cases" (App. 86a). He then justified the suppression with the assertion that the carton was "but a small piece of circumstantial evidence".

The prosecutor also testified, along the lines of his affidavit, that he had not realized the significance of Aaron Levy's statement, that he had thrown away all the cartons. He explained that there were many people "milling around and talking back and forth in his office" when the statement was made (App. Tr. 56). He admitted, however, that after Aaron Levy told him that he had thrown away all the cartons, he had said to Aaron Levy, "We won't need you as a witness" (App. Tr. 53).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. [12]

Respectfully submitted,

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[12] While not strictly relevant to the Court's review of the legal issues presented, petitioner points out that she has steadfastly maintained her innocence of the charges brought against her on all counts. *Cf. United States* v. *Miller*, 381 F.2d 529, 531 (1967). The investigation commenced by present counsel turned up considerable new evidence that the allegedly stolen stereos seized from Levy, Hendler, and Beddo were never in fact stolen at all, but may have been passed from the alleged victim of the theft (North American Foreign Trading Corp.) through the consignee and others to allegedly "legitimate" purchasers. See Brief for Appellant, pp. 6-7.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 133—September Term, 1973

(Argued September 24, 1973 Decided October 12, 1973.)

Docket No. 73-1776

UNITED STATES OF AMERICA, *Appellee*,

—against—

ZALI FRIED, *Appellant*

Before:
KAUFMAN, *Chief Judge*,

MOORE and MANSFIELD, *Circuit Judges*

Appeal from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, denying a motion for a new trial on the grounds of newly discovered evidence.

Affirmed as to Count 2 and reversed and remanded as to Count 3.

NATHAN LEWIN, Esq., Washington, D.C. (Miller, Cassidy, Larroca & Lewin, Washington, D.C., Steven H. Thal, Esq., Thal & Youtt, New York, N.Y. of counsel), *for Appellant*.

BERNARD J. FRIED, Assistant United States Attorney (Robert A. Morse, United States Attorney, Eastern District of New York, L. Kevin Sheridan, Assistant United States Attorney, Brooklyn, N.Y., of counsel), *for Appellee*.

PER CURIAM:

Following a jury trial before Judge Bartels, Zali Fried was convicted of unlawful possession of some 589 cartons of Unisonic AM-FM stereos stolen from a foreign ship-

ment of freight, 18 U.S.C. § 659 (Count 2), and of unlawful sale of the stolen goods, 18 U.S.C. § 2315 (Count 3). She was sentenced to three years' imprisonment and a $5,000 fine on Count 2 and a subsequent two-year period of probation on Count 3. On appeal this court affirmed the conviction. 464 F.2d 983, *cert. denied*, 407 U.S. 911 (1972). Subsequently, Mrs. Fried moved pursuant to Rule 33, F.R.Cr.P., for a new trial, alleging that the prosecution had suppressed several pieces of material information. After an evidentiary hearing Judge Bartels denied the motion, finding that the suppression was not deliberate and that the suppressed or newly discovered evidence would not in any case have affected the jury's verdict. We reverse the order insofar as it relates to Count 3 and remand for a new trial on that count. Otherwise the order is affirmed.

The principal item of information which the government failed to disclose to the defense was the pendency in the Southern District of New York of an indictment against Joseph Levy, a key government witness, charging him with receiving other stolen goods (a shipment of clothing stolen from a pier). The indictment was particularly significant for the reason that if it had been disclosed by the government the defense would have used it to impeach Levy's credibility and would have urged that he was testifying favorably for the government against Mrs. Fried in the expectation that he would be accorded leniency in the pending case against him. See *United States* v. *Bonanno*, 430 F.2d 1060 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970); *United States* v. *Campbell*, 426 F.2d 547, 549 (2d Cir. 1970). Indeed, as matters turned out Levy was later convicted after a trial in the Southern District of New York and the prosecutor in the present case wrote a letter to the sentencing judge pointing out the importance of Levy's testimony against Mrs. Fried. Thereafter Levy received a suspended sentence and $1,000 fine. In addition, since the indictment against Levy charged him

with the same type of offense as that leveled against Mrs. Fried (receiving goods stolen off a pier), a jury might have reasoned that Levy may have been implicating Mrs. Fried in order to exculpate himself in the present case.

At the conclusion of the post-trial hearing Judge Bartels found that the prosecutor's non-disclosure of the indictment, though careless, was not deliberate. With some reluctance we accept this finding which has evidentiary support in the testimony of the prosecutor himself, Assistant United States Attorney Thomas Puccio. Surely the average competent prosecutor would quickly recognize the importance and value of this information to the defense, even in the absence of a request for it. Such negligence hardly adds lustre to an important government office whose aim should be to achieve justice rather than merely to obtain convictions.

Accepting the view that this was a case of negligent non-disclosure, we are governed by the rule that a new trial may be ordered only upon a showing that there is a significant chance that the non-disclosed item, developed by skillful counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. See *United States* v. *Miller*, 411 F.2d 825 (2d Cir. 1969); cf. *United States* v. *Bonanno*, 430 F.2d 1060 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970). We find that this test has been met as to Count 3, which was based entirely on the sale of stolen goods. Since the government's case against Mrs. Fried in support of Count 3 rested almost entirely on Levy's testimony, it is clear that if the indictment against him for possession of other stolen goods had been revealed by the government his credibility would probably have suffered a severe blow. There is therefore a significant chance that such a material disclosure would have raised a sufficient doubt in the minds of enough jurors to negate conviction.

We cannot conclude that such evidence might have induced a similar doubt with respect to Mrs. Fried's guilt on Count 2, which charged unlawful possession of stolen goods, including stereos other than those sold to Levy. That count was established by proof wholly independent of Levy's testimony. For instance, William Hendler, a Philadelphia appliance dealer, testified that on October 28, 1970, Mrs. Fried induced him to purchase 15 cartons of stereos later proved to have been stolen, which were shipped to him from a non-existent concern, G. S. Trading Company, 55 Avenue A, New York City. Later she called him once or twice and offered to sell him other merchandise. This testimony by Hendler, which remains untainted by the impeaching effect of the disclosure of Levy's indictment, provides an ample independent basis for the verdict finding Mrs. Fried on the possession count.

To the extent that Mrs. Fried's additional arguments are directed toward impeachment of Joseph Levy's credibility (e.g., that he gave perjured testimony) our foregoing dispostion renders further discussion of that issue unnecessary. We find no merit in the other grounds urged in support of a new trial. There is no showing that evidence regarding seizure of some of the stolen stereos in the possession of so-called "legitimate" purchasers could not have been uncovered with due diligence prior to trial. Indeed, the witness Kalman Lax was called by the defense and gave testimony as to seizure of cartons in his store. Since the earlier arrest of the witness Serhofer on charges of grand larceny and receipt of stolen property was unknown to the government, the information was not suppressed. Furthermore, it does not rise to a level that would warrant a new trial. See *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

The order of the district court denying a new trial of Count 3 is reversed and the case is remanded for a new trial of that count. In all other respects the district court's order is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

71 CR 584

UNITED STATES OF AMERICA,

against

ZALI FRIED, *Defendant*

BARTELS, D. J.

Memorandum Decision and Order

Zali Fried moves this court, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, 18 U.S.C., for an order granting a new trial based upon newly discovered evidence and upon evidence of an exculpatory nature allegedly suppressed by the prosecutor, Assistant U.S. Attorney Thomas P. Puccio. Incidental to the motion for a new trial, defendant moves this court for a post-trial discovery order for inspection of certain documents and reports allegedly in the prosecution's possession, which are likely, defendant contends, to establish the negligent suppression of exculpatory evidence. Accordingly, the court held a hearing at which Assistant U. S. Attorney Puccio was examined at length.

On March 3, 1972, following a nine-day jury trial, Zali Fried, along with her son Simon Brach, was convicted on one count of unlawful possession (18 U.S.C. § 659), and one count of unlawful sale (18 U.S.C. § 2315) of "Unisonic" AM-FM stereos, moving as part of a foreign shipment of freight. Fried was sentenced to three years in prison and a fine of $5,000 on the first count, and on the second count she was placed on probation for a two-year

period following the completion of the prison sentence. Her conviction was affirmed by the Court of Appeals, Second Circuit, on July 25, 1972, and on December 11, 1972 the Supreme Court denied Fried's petition for a writ of certiorari. Bail has been continued throughout the lengthy appeal process.

New Trial Standards

It is well settled that motions for new trial are not favored, *United States* v. *Johnson*, 327 U.S. 106 (1946), and, in the interest of finality of judgments, should not be granted unless the defendant satisfies certain minimum requirements. A new trial may be granted under Rule 33 "if required in the interest of justice." In such event, the evidence must meet the following requirements: (a) It must have been discovered since the trial; (b) It could not have been discovered with due diligence before or, at the latest, at the trial; (c) It must be material and not merely cumulative or impeaching; and (d) It must be of such a nature that it would probably produce a different verdict in the event of a retrial. See *United States* v. *Kahn and Teleprompter*,——F.2d——(2d Cir., January 9, 1973) (Slip Op. 1395); *United States* v. *DeSapio*, 456 F.2d 644 (2d Cir. 1972); *United States* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969); *United States* v. *Costello*, 255 F.2d 876 (2d Cir. 1958) *cert. denied*, 357 U.S. 937; *Larrison* v. *United States*, 24 F.2d 82 (7th Cir. 1928).

When, however, the newly discovered evidence was known to the Government at the time of trial but not disclosed, new dimensions are added to the rule. As we read the authorities, governmental suppression of evidence, which requires a new approach, may be classified in three categories: (1) Deliberate suppression, including failure to disclose evidence whose high value to the defense must have been obvious to the prosecutor, *United States* v. *Keogh*, 391 F.2d 138, 147-48 (2d Cir. 1968); (2) Suppression, after

a request by defendant, of evidence favorable to the accused, material either to guilt or punishment, irrespective of the good or bad faith of the prosecutor. *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Giglio* v. *United States*, 405 U.S. 150 (1972). The prejudice to the defendant, according to *Polisi*, *supra*, is to be measured by the effect of the suppression upon defendant's preparation for trial, rather than its effect upon the jury's verdict. But at all events it must be material and of some substantial use to the defendant. (3) Non-deliberate suppression of evidence by the prosecutor. In such event, a showing must be made that the suppressed evidence would probably have produced a different verdict. *Kyle* v. *United States*, 297 F.2d 507 (2d Cir. 1961). Placing in this category forgetfulness and failure to appreciate the use which the defense might make of the evidence, Judge Friendly said in *United States* v. *Keogh*, *supra*:

> "To invalidate convictions in such cases because a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties." 391 F.2d at 148.

Application of the Standards

We turn now to the application of the above criteria to defendant Fried's motion for post-trial discovery and for a new trial. A brief description of the facts follows.

Defendant and her husband, Ishak Fried, are in business in Brooklyn, New York, of importing and selling Japanese stereo radios under the name "Granada". On October 22d and 23d, 1970, approximately 589 cartons, each containing two sets of Japanese Eight-Track Stereos ("Unisonics"), valued at over $62,000, were stolen from Pier 21 in Brooklyn, while consigned to the sole American Importer, North American Foreign Trading Corporation ("North American"). The theft was discovered soon

thereafter, on October 26th, "and within weeks three separate quantities of the missing stereos were found in the hands of a New York City retailer, Joseph Levy, a Philadelphia wholesaler, William Hendler, and retailers who had purchased sets from a Pennsylvania wholesaler, Carl Beddo." *United States* v. *Fried and Brach*,——F.2d ——(2d Cir., July 25, 1972 (Slip op. 4263, 4264). To continue that Court of Appeals summary, "Of the 85 stereo units seized from an Orchard Street loft in Manhattan from Levy, at least 82 bore serial numbers falling within the range of serial numbers for the missing units. Only one shipping carton was found at Levy's, and that in the hallway immediately outside the storeroom. Twenty-two units were seized from Hendler along with ten empty cartons; of these, 20 units and eight cartons bore stolen serial numbers. Six units were taken from purchasers from Beddo, of which five bore numbers within the indicated range. Not insignificantly, all of the units seized from Levy and Hendler, and at least half of those seized from customers of Beddo were sold by people connected with Fried Trading Co., a Brooklyn firm owned," *Id.*, at 4265, by Zali Fried and her husband.

As the Appellate Court has already noted, ample facts were adduced to support defendant Fried's conviction. According to witness Hendler, Zali Fried called him and sold him a couple of dozen of the stereos "at only $5.00 per unit above North American's cost and a full $7.00 below North American's lowest selling price to retailers." *Id.*, at 4265. Hendler received no bill or invoice from Fried before or after delivery of the units; furthermore, the shipping label on the cartons referred to "G & S Trading Co.," an altogether fictitious company. No bill or invoice was received by Levy either. Beddo purchased his stereos "over-the-tailgate," from a parked truck at the Fried place of business. Defendant Fried never adequately explained how Fried Trading Co. became seller of Unisonics in late October, 1970; and this was especially in-

criminating in view of the fact that neither Unisonics nor North American had ever sold stereos to the Frieds or their firm. While not all of the stereos and cartons seized from Hendler, Levy and Beddo fit the range of serial numbers from the stolen stereos, most did.

In the context of the above background, we now consider defendant Fried's contentions: She contends that "the Government picked and chose from all of the evidence available, to select those items most incriminating defendant. The balance of the Government's evidence, which was exculpatory of defendant's guilt, was simply neglected and not turned over to the defendant as required under *Brady* v. *Maryland*, 373 U.S. 83 (1963)." In support of these charges and both of her motions, she claims that she has discovered new data which sheds new light on her culpability. She maintains that the prosecutor was guilty of suppression of evidence because:

1. Stolen Unisonic stereos from the same shipment turned up in the hands of others: Lax, Garfinekel, Chai Sales, and Lowinger, chief executive of North American, the consignee, and the prosecution never revealed this purportedly exculpatory material to the defense.

Viewed most favorably, defendant's position is that stolen Unisonic stereos were circulating throughout the market. This in no way exculpates defendant Fried. There is no evidence whatsoever to support the assertion that the Government unfairly and arbitrarily singled out the Frieds for prosecution. Nor is there any evidence of governmental suppression of exculpatory data. On this score, the Assistant United States Attorney avers that he "had no specific knowledge concerning the alleged seizures from these other individuals . . ." And at no point throughout the trial did the Government maintan that the list of stolen stereos seized from Hendler, Beddo and Levy was complete. Indeed, at the trial itself, Lax was called by defense, and Lowinger recalled by defense for the purpose of

establishing precisely the same point they now urge as a newly discovered fact. Whatever the case may have been as to Lax, Garfinckel, Chai Sales and Lowinger, we repeat, the circumstantial evidence was overwhelming against Fried. Therefore the so-called "suppression of new data" under this point is totally unsupported by any evidence.

2. One Andrew Serhofer—the trucker authorized by North American to pick up the stereos at the pier—was apparently arrested for theft of goods from the pier on another occasion, and therefore it is plausible to suspect him of actually having stolen the stereos in the instant case. Again there is no evidence to indicate that the prosecutor had knowledge of Serhofer's alleged past criminal activity. Assistant United States Attorney Puccio has sworn that he knew nothing of Serhofer's past. Moreover, an arrest, without conviction, would have been inadmissible to impeach witness Serhofer.

3. The Assistant United States Attorney failed to disclose the existence of an indictment pending in the Southern District of New York against Joseph Levy, a key witness, for possession of stolen property at the time he testified in this case.

The prosecutor concedes that he knew that the witness, Joseph Levy, was under indictment in the Southern District of New York at the time he testified for "criminally receiving stolen property" and that he failed to disclose the same on the assumption that it could be of no use to the defense and thus was irrelevant to the case. The Assistant United States Attorney testified that Joseph Levy's attorney, Gilbert Rosenthal informed him of the pending indictment in the Southern District of New York, before the instant case came to trial, but that the assistant had never been given a "rap sheet" on Levy by anyone. We note at the same time that trial counsel for Fried never demanded from the Government a "rap sheet" or an ar-

rest record or any background information concerning Joseph Levy. It has been held that "such evidence of misconduct as an indictment is not normally admissible for impeachment purposes. See *United States* v. *Rowe*, 360 F.2d 1, 14-15 (2d Cir.), *cert. denied*, 385 U.S. 961, 87 S.Ct. 401 . . . (1966)." *United States* v. *Acarino*, 408 F.2d 512, 513 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969). Even if Levy's indictment had been disclosed at the trial, no inference can be drawn from this omission that the result would have been different. To repeat what was said in *United States* v. *Acarino*, *supra*, at 516: "We do not express approval of the decision of the assistant not to inform the court and the defense of his discovery that a key witness was under indictment." While it is true that an indictment may not be admissible at trial to impeach credibility, arguably it might be admissible to show possible motivation of the witness to testify favorably for the Government and also lead the defense to investigate possible governmental promises to the witness. See, *e.g.*, *United States* v. *Bonanno*, 430 F.2d 1060 (2d Cir. 1970). However, at the hearing Assistant United States Attorney Puccio categorically denied that any promises were made to Levy with respect to the Southern District indictment or otherwise for his testimony.[1] We believe that the Assistant was careless in not making the disclosure and that his failure to disclose was improper conduct in spite of the probability that the indictment would not have been admissible. But we also find that the evidence was not deliberately suppressed for the sake of obstruction, nor that its value

[1] On May 30, 1972, some time after the completion of the instant case, and after Joseph Levy was convicted in the Southern District of New York, the Assistant United States Attorney sent a letter to Judge Wyatt, the sentencing judge in the Levy case, indicating that Levy's cooperation was indispensable to the prosecution of Zali Fried. We believe this *ex post facto* statement in no way controverts Puccio's categorical denial that no promises were made to Levy in order to induce his testimony.

to the defense was so high that it could not have escaped the prosecutor's attention. We believe that its disclosure would have had no effect upon the jury's verdict. Therefore, we find no justification for ordering a new trial upon this ground. See *United States* v. *Keogh*, *supra*; *United States* v. *Acarino*, *supra*, at 516.

In support of her position, defendant cites *United States* v. *Bonanno*, *supra*, which involved a negligent non-disclosure by the prosecutor of the existence of an indictment against a major prosecution witness. There the Court held that since this was not a deliberate suppression and since the non-disclosed evidence was not of a nature whose high value to the defense "could not have escaped the attention of the prosecution," a new trial should not be ordered. At the same time that Court pointed out that the question to be resolved in cases of this type is whether there was a significant chance that this added data could have induced a reasonable jury to avoid a conviction. See also *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969). The answer to this question in this case must be in the negative.

4. A Unisonic outer carton bearing a serial number within the stolen range, found by an agent outside of Joseph Levy's storage loft, was received in evidence, when in fact it did not belong to Levy but to a neighboring merchant, Sonny Goldsmith. Fried contends that Joseph Levy's brother, Aaron, informed the prosecutor of this fact and the prosecutor chose to withhold this information from the defendants, even though it too would have established that many other persons were in possession of stolen Unisonic stereos, and that at least part of the evidence introduced against Fried was evidence unrelated to Fried.

Assistant United States Attorney Puccio avers that while the trial was in progress he spoke to Aaron Levy about the delivery of Unisonics to JNL Discount Center by Simon Brach. Aaron Levy's version "was essentially the

same as that of his brother Joseph Levy." Puccio recalls that Aaron Levy "stated that he had thrown away the outer cartons which had contained the Unisonics. This was for the most part consistent with the testimony at the trial which indicated that 100 Unisonics contained within 50 outer cartons were delivered to the JNL Discount Center and that only one such outer carton was found when the police searched Levy's loft and its general vicinity. Since almost all the Unisonics found at JNL Discount Center bore serial numbers which were within the range of the stolen Unisonics, the significance of Aaron Levy's statement to me that he had thrown away all the outer cartons was not immediately apparent."

We accept the Assistant United States Attorney's version of the facts and conclude that failure to disclose this data was not a deliberate suppression of exculpatory evidence. It was, at most, data which hindsight discloses might have been put to some use by defendant's counsel. See *United States* v. *Keogh*, *supra*, at 148, and discussion, *infra*, at 2-4. What use the defendant could have made of this evidence is not immediately apparent except to show that others, in addition to Levy, possessed stolen Unisonic stereos. In our opinion, the chance that this added data would have induced a jury not to convict Zali Fried was insignificant. It was proven by overwhelming evidence that the Unisonics found at Levy's loft were part of the stolen load of merchandise and that Zali Fried sold these Unisonics to Levy at $7.00 below the consignee's lowest selling price. The carton found outside Levy's loft was but a small piece of circumstantial evidence leading to the conviction which would have resulted, in our opinion, without it. As the Court of Appeals in affirming the conviction, remarked:

> ". . . when stereos with the same serial numbers as the missing units in 80 or 90 per cent of the cases, [82 of 85 in the Levy seizure; 5 of 6 in Beddo's case; and

> 20 of 22 with respect to Hendler] and cartons with the same numbers in several instances are sold by a business that has never bought them, at a price a little lower than the usual wholesale price, and without the customary invoicing, the inference that can be drawn by a rational trier of fact is not very remote. To appellate judges who review records, it is difficult to see how any other inference could be drawn in this case." *United States* v. *Fried and Brach*, *supra*, at 4266.

We might also add that the witness Hendler testified that Zali Fried called him and offered him a "couple of dozen" stereos in Philadelphia, thus implicating her directly, and without any reference whatsoever to the one carton found outside Levy's JNL Discount Center.

5. Finally, the Government failed to turn over to defendant an affidavit from the Japanese manufacturer of the stolen Unisonic stereos regarding the serial numbers on the stereos. The Assistant United States Attorney has categorically denied the existence of any such document, even to this day. Additionally, the Assistant testified that Government files contain no exculpatory data.

For the above reasons, defendant Fried's motions are hereby denied and her bail continuance revoked. She is ordered to report to the United States Marshal on May 11, 1973, to commence serving her sentence.

This is an ORDER.

Dated: Brooklyn, New York
April 10, 1973.

United States District Judge

APPENDIX C

May 30, 1972

Hon. Inzer B. Wyatt
United States District Judge
Southern District of New York
United States Court House
Foley Square
Room 1201
New York, New York 10007

Re: United States v. Joseph Levy
Docket No. 70 CR 133

Dear Judge Wyatt:

I have been informed by Probation Officer Norman Best that Joseph Levy will be sentenced by the Court on May 31, 1972.

I first met Mr. Levy during 1971 in connection with a theft from interstate shipment prosecution undertaken by our office. Mr. Levy fully cooperated with the Federal Bureau of Investigation and our office and testified both in the grand jury and at trial. Without his testimony the prosecution of the defendants Zali Fried, Simon Brach and Aaron Schatten would not have been successful.

This information is provided for whatever guidance it may afford the Court in imposing sentence upon Mr. Levy.

Very truly yours,

ROBERT A. MORSE
United States Attorney

By:
Thomas P. Puccio
Assistant U. S. Attorney

cc: Norman Best
U. S. Probation Department
Southern District of New York
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